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No. 04-1693

2005

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IN THE

Supreme Court of the United States

CONTESSA PREMIUM FOODS, INC.,

Petitioner,

v.

BERDEX SEAFOOD, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MAZZETTA COMPANY LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Mazzetta Company LLC (formerly, The Mazzetta Company) states that it has no parent corporation and no publicly held corporation holds ten percent (10%) or more of its stock.

STATEMENT OF FACTS RELEVANT TO MAZZETTA COMPANY LLC

Petitioner Contessa Premium Foods, Inc. ("Contessa"), in its Statement, implies that *all* of the "Sea Star" frozen shrimp offered for resale in the United States by Lockpur Food Products, Inc. ("Lockpur") from 1997 through 1998 was packaged "in four-pound boxes displaying a virtual duplicate of the so-called Boiling Shrimp Image, with only the chopsticks removed." Petition for Certiorari, at 3. The Record, however, contains evidence that during the same time period, Lockpur also used a blue and white packaging that Contessa acknowledged did not infringe any of its rights. [Mazzetta's Supplement Excerpts of the Record in the Court of Appeals ("MSER"), Tab 2, pp. 008-009 ¶3].

In 1998, Respondent Mazzetta Company LLC ("Mazzetta") and Contessa entered into a settlement agreement relating to one shipment of imported frozen shrimp from Lockpur to Mazzetta which is not part of Contessa's claims here or in the courts below. [MSER Tab 3, pp. 013-14 ¶8]. Earlier in 1998, Mazzetta had imported four other shipments of frozen shrimp from Lockpur which are the subject of Contessa's claims here and below; to the best of Mazzetta's knowledge, the only shipment that contained any packages bearing the allegedly infringing image was the one that was subject to the settlement between Mazzetta and Contessa. [MSER Tab 2, p. 009 ¶14]. With regard to the shipments at issue in the litigation, "there is no admissible evidence in the record that . . . Mazzetta ever possessed, let alone distributed, the allegedly infringing packaging. . ." App. 6a.

REASONS FOR DENYING THE PETITION

Mazzetta opposes Petitioner Contessa's Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. Specifically with regard to Mazzetta, there is no longer any case or controversy, thus there is nothing for the Court to review and this Court lacks jurisdiction.

On Page 6 of its Petition, in footnote 5, Contessa conceded that it is not seeking review of the trademark claims against Mazzetta and other respondents:

> With respect to five other defendants [including Mazzetta], the [Ninth Circuit] court held that petitioner's [Contessa's] trademark claims failed *because petitioner had not produced sufficient evidence to show that those defendants had ever used the Boiling Shrimp Image in commerce.* App. 6a–7a. *Petitioner* does not seek review of this aspect of the court of appeals' decision and, accordingly, *does not challenge the judgment with respect to those five defendants on the trademark claims.*

(Emphasis added.) Indeed, the facts underlying Contessa's trademark claims are exactly the same as those underlying its allegations of copyright infringement with respect to Mazzetta. Recognizing this, the Ninth Circuit reversed the District Court's denial of attorneys' fees to Mazzetta (and others) under the Copyright Act stating: "there is no admissible evidence in the record that . . . Mazzetta ever possessed, let alone distributed, the allegedly infringing packaging. . . ." App. 6a. Therefore, regardless of the recent holding in *MGM Studios, Inc. v. Grokster Ltd.*, No. 04-480 (Slip Op., June 27, 2005) ("*Grokster*"), there simply is

no evidence in the record to support a finding of infringement by Mazzetta of the so-called "Boiling Shrimp Image" in which Contessa claimed intellectual property rights.

A remand in light of this Court's recent decision in *Grokster* could not change the outcome as to Mazzetta. The holding articulated by the Court in *Grokster* is that "one who *distributes a device* with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." (Slip. Op. p. 1 (emphasis added).) With regard to Mazzetta, this discussion is inapplicable as Contessa never submitted proof that Mazzetta distributed anything other than boxes of frozen shrimp. Frozen shrimp certainly is not the sort of device or service contemplated by *Grokster*, as the frozen shrimp has no proven (let alone known) utility for fostering infringement. Contessa's failure to adduce any evidence that Mazzetta ever distributed anything that infringed its claimed intellectual property rights necessarily means that the result would remain unchanged upon remand.[1]

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1. Of course, the *Grokster* opinion also does not have any bearing on the District Court's conclusion that Contessa has no valid copyright which the Ninth Circuit chose not to reach. App. 4a n.1, 9a-22a.

CONCLUSION

In light of the reasons set forth above, Mazzetta respectfully requests that Contessa's petition for certiorari be denied as to Mazzetta.

Respectfully submitted,

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